SAIFUL NIZAM ADNAN v. JABATAN KERJA RAYA NEGERI SELANGOR & ORS

HIGH COURT MALAYA, SHAH ALAM
GUNALAN MUNIANDY JC
[SUIT NO: 21NCVC-12-04-2015]
18 NOVEMBER 2016

ADMINISTRATIVE LAW: *Natural justice – Breach – Dismissal – Act of Lembaga Tatatertib Suruhanjaya Perkhidmatan Awam Negeri Selangor via letter informing plaintiff of his dismissal and cancellation of emolument rights – Whether done in cavalier manner and prejudicial to plaintiff – Whether reasonable and in accordance with principles of natural justice – Whether relevant provisions infringed – Whether decision invalid, void and a nullity*

CONSTITUTIONAL LAW: *Public servants – Dismissal – Natural justice – Whether breached – Act of Lembaga Tatatertib Suruhanjaya Perkhidmatan Awam Negeri Selangor via letter informing plaintiff of his dismissal and cancellation of emolument rights – Whether done in cavalier manner and prejudicial to plaintiff – Whether reasonable and in accordance with principles of natural justice – Whether relevant provisions infringed – Whether decision invalid, void and a nullity*

The plaintiff was employed as a driver grade 3 at the Jabatan Kerja Raya ('JKR') Sabak Bernam before being transferred to JKR Cawangan Kejuruteraan Mekanikal Negeri Selangor with effect from 15 June 2012. The plaintiff then applied for deferment of the transfer twice until 15 July 2012 and 31 August 2012 respectively, which were allowed by the first defendant. However, the plaintiff failed to report for duty at the JKR Shah Alam even after the deferment period had lapsed right until the day that the penalty of dismissal was passed against the plaintiff. Action was taken to withhold the plaintiff's salary and emoluments with effect from 1 September 2012 as the plaintiff was not at his place of work. The Chairman of the Disciplinary Board 'Kumpulan Sokongan' (No. 2) of JKR Selangor recommended the penalty of dismissal against the plaintiff under reg. 37, Public Officers Disciplinary Regulations Selangor 1995 (Amendment) 2006 ('the Regulation') and forwarded the recommendation to the Public Services Commission State of Selangor ('the second defendant'). The Chairman of the second defendant with the agreement of its members at the meeting of the Commission imposed the penalty of forfeiture of emolument for the period that the plaintiff was absent from work and thereafter dismissal from the public service. The plaintiff thus claimed against the defendants for, *inter alia,* a declaration by the court to cancel the dismissal of plaintiff and for the first defendant to refund to the plaintiff all arrears of salaries and emoluments. The issues that arose for determination were, *inter alia*, whether the act of the Lembaga Tatatertib Suruhanjaya Perkhidmatan Awam Negeri Selangor ('third defendant') *via* letter dated 10 August 2014 informing the plaintiff that the his emolument rights had been dishonoured and that he was dismissed

from service with immediate effect from the date the letter was served on him was reasonable and in accordance with the principles of natural justice. It was the plaintiff's case that his dismissal and cancellation of emolument was done in a cavalier manner and was prejudicial to him and not in accordance with the law and due process.

Held (entering judgment for the plaintiff):

(1) The third defendant, based on the minutes of its meeting to consider the recommendation to dismiss the plaintiff and other several public servants, took less than a minute to make its decision. Hence, it was manifestly clear that the third defendant did not give consideration to or deliberate upon the reports and evidence against the plaintiff before making its decision. Under the Disciplinary Regulations or Peraturan Pegawai Awam Negeri Selangor ('the Regulations') governing disciplinary action and procedure against public servants in Selangor, it was mandatory and crucial for the Disciplinary Board or Lembaga Tatatertib ('third defendant') to duly consider and deliberate upon all the relevant facts and evidence on record against public servants relating to the alleged misconduct by him before making its decision and imposing the appropriate penalty. (paras 42-44)

(2) From regs. 37 and 37D of the Regulations, the disciplinary authority plays the most vital role in the disciplinary proceedings leading eventually to its decision. Based on the provisions therein, it was encumbered for the DA to exercise its mind and consider all the information and reports as well as representations before making its findings at the various stages and its final decision. Therefore, the third defendant's action in issuing letter dated 10 August 2014 to the plaintiff informing him that his right to emoluments had been forfeited and that he was dismissed from public service was not in accordance with the law for infringing the relevant provisions of the Peraturan Pegawai Awam Negeri Selangor and established rules of natural justice. Hence, the impugned decision of the third defendant was therefore invalid in law and void and a nullity. (paras 45 & 46)

(3) The claim for aggravated damages need not be considered as the plaintiff had not satisfied any of the criteria for this type of damages to be awarded, *inter alia*, he had failed to set out in his statement of claim the essential particulars or the factual matrix or special facts that would justify this claim being awarded. Therefore, the plaintiff was not entitled to exemplary damages. (para 48)

Case(s) referred to:

Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA ***(refd)***
Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors [2015] 8 CLJ 125 HC ***(refd)***
Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd [2014] 4 CLJ 323 CA ***(refd)***

Legislation referred to:
Federal Constitution, art. 13

For the plaintiff - S Saravanan; M/s S Muthu & Co
For the defendant - Nor Fariza Ridzuan; Assistant Legal Advisor, Selangor

Reported by Suhainah Wahiduddin

JUDGMENT

Gunalan Muniandy JC:

[1] This claim by the plaintiff ('PW1') against the defendants ('D1, D2 and D3') is for the following reliefs:

(a) A declaration by the court to cancel the dismissal of the plaintiff;

(b) A declaration by the court to cancel the forfeiture of the plaintiff's right to emoluments;

(c) A declaration from the court ordering the first defendant to reinstate the plaintiff's employment to his original post;

(d) A declaration from the court ordering the first defendant to refund to the plaintiff all arrears of salaries and emoluments;

(e) Exemplary damages to the plaintiff;

(f) Cost of this action; and

(g) Any other relief that is deemed fit and fair by the court.

Agreed Facts

[2] The agreed facts are as follows:

(a) The first defendant was the plaintiff's employer at the material time.

(b) The plaintiff at the material time was employed by the first defendant in JKR Sabak Bernam, Selangor as a driver grade 3.

(c) The plaintiff was transferred from JKR Sabak Bernam to JKR Mechanical Engineering Department of Selangor, Shah Alam.

Summary Of Defendants' Case

[3] Plaintiff was employed as a driver grade R3 at Jabatan Kerja Raya Sabak Bernam before he was transferred to JKR Mechanical Engineering Department Negeri Selangor on 15 June 2012.

[4] Plaintiff had twice asked to defer the transfer on 15 July 2012 and 31 August 2012, and these were allowed by the JKR Selangor Head Quarters.

[5] Plaintiff failed to report duty at JKR Mechanical Engineering Department, Selangor even though the deferred date had passed.

[6] Salary payments and emoluments were withheld since 1 September 2012 because the plaintiff was not at the workplace.

[7] Chairman of Disciplinary Board 'Kumpulan Sokongan' (No. 2), Jabatan Kerja Raya Negeri Selangor had decided for a dismissal from employment or downgrading pursuant to r. 37 of the Selangor Public Officers Regulation (Disciplinary Action) 1995 (Amendment) 2006.

[8] Chairman of Disciplinary Board, Public Services Commission of Selangor, with agreement from the meeting of members had sentenced the plaintiff to cancellation of his emolument rights for the days the plaintiff was absent and dismissal from service.

Issues For Determination

[9] Whether the second defendant's act for making a report on 12 June 2014 to the third defendant that the plaintiff had committed misconduct liable for a disciplinary action is reasonable and in accordance with the rules of natural justice?

[10] Whether the third defendant's act *via* letter dated 10 August 2014 informing the plaintiff that the plaintiff's emolument rights had been dishonoured and that he was dismissed from service with immediate effect from the date of the letter was served on him is reasonable and in accordance with the principles of natural justice?

[11] Whether the plaintiff has breached any regulations as a civil servant?

[12] Whether the plaintiff has failed to comply with the transfer order issued?

[13] Whether the defendants' decision to dismiss the plaintiff from his position as a civil servant is valid in law?

Factual Background

[14] At the material time, PW1 was a member of the public service as driver grade R3 in the Jabatan Kerja Raya ('JKR') in Sabak Bernam, Selangor before being transferred to JKR Cawangan Kejuruteraan Mekanikal Negeri Selangor, Shah Alam with effect from 15 June 2012.

[15] PW1 then applied for deferment of the transfer twice until 15 July 2012 and 31 August 2012 respectively. Both requests for deferment were allowed by the first defendant ('D1').

[16] However, PW1 failed to report for duty at the JKR Shah Alam even after the deferment period had lapsed right until the day that the penalty of dismissal was passed against him.

[17] Action was taken to withhold PW1's salary and emoluments w.e.f. 1 September 2012 as PW1 was not at his place of work.

[18] The Chairman of the Disciplinary Board 'Kumpulan Sokongan' ('No. 2') of JKR Selangor recommended the penalty of dismissal against PW1 under reg. 37 of the Public Officers Disciplinary Regulations Selangor, 1995 (Amendment) 2006 ('the Regulation') and forwarded the recommendation to Public Services Commission, State of Selangor ('second defendant - D2').

[19] Following the above, the Chairman of D2 with the agreement of its members at the meeting of the commission imposed the penalty of forfeiture of emolument for the period that PW1 is absent from work and thereafter dismissal from the public service.

Finding

[20] The plaintiff ('PW1') did not challenge the defendants' contention on the first issue as to whether PW1 had committed a disciplinary offence. PW1 himself admitted that after the deferment period to report for duty at the JKR Shah Alam had lapsed on 31 August 2012 he still failed to do so. He was required to report for duty there on 1 September 2012. Significantly, during that period from June-August 2012 there was no record of his attendance at JKR Sabak Bernam as well as he had, admittedly, taken away his punch cards from the custody of that office. As for JKR Shah Alam, there was no record at all of his attendance at any time after 1 September 2012.

[21] As PW1 did not dispute having been absent from duty without permission or reasonable cause, he had committed a disciplinary offence under reg. 26(1) of the Regulation by his own admission of the facts in relation thereto.

[22] The focus of PW1's contention in support of his claim based on unlawful dismissal was in regard to the second issue, namely, whether D3's decision by letter dated 10 August 2014 to forfeit his emoluments and dismiss him from the public service forthwith upon service of the said letter was reasonable and in accordance with law, particularly the rules of natural justice. Issue no. 4 (para. 12) can be conveniently dealt with together with this central issue.

[23] As pointed out by the defendants, the procedure applicable to the disciplinary case against PW1 is set out expressly in reg. 26 of the Regulation and compliance with the procedural formalities governing the complaint against PW1 was not disputed.

[24] What is crucial in respect of the sole issue raised by PW1 to challenge the decision of D3 is reg. 37 of the Regulation, the relevant provisions of which require D3 to apply its mind to and consider, the following as summarised by the third defendant:

(a) whether there was a *prima facie* case against PW1 after having considered the facts relating to the offence alleged and the grounds for the proposed dismissal or demotion in rank (reg. 37(2)(a));

(b) a written representation submitted by PW1 containing the grounds relied upon to clear him of the charge; and

(c) whether, after considering the representation from PW1, the representation is found to be insufficient to clear him of the charge to the satisfaction of D3.

[25] If D3 so finds, D3 is further required to consider and decide whether to impose the penalty of dismissal or reduction in rank on PW1.

[26] At this point, it is vital to note that the above are mandatory requirements and steps that D3 must adhere to before it makes it finding on the guilt or innocence of the public servant and decides on the appropriate penalty under the circumstances.

[27] In contending that PW1 had proved his case as pleaded and that the action taken against him was not in accordance with law and procedure, including rules of natural justice, his counsel highlighted several salient facts from the evidence given by D2's key and sole witness ('DW2') who was the then secretary of D2. DW2, who testified that he had full knowledge of this disciplinary case conceded to the following under cross-examination:

(a) It is mandatory under the law for a Disciplinary Board meeting to be held before a public servant is dismissed or deprived of his right to emoluments.

(b) If he is so dismissed or his right to emoluments withdrawn without the said meeting being held, the penalty imposed on him would be invalid.

(c) Something was amiss from the minutes of meeting of the Lembaga Tatatertib ('D3') held on 29 July 2013.

(d) The decision taken by D3 in the case of PW1 was unfair.

(e) The meeting of D3 held in the case of PW1 was not fairly conducted and improper.

(f) From the minutes, the fate of eight public servants was determined by D2 on the same day and at the same time.

(g) The board meeting, based on the minutes, began at 9.30am and ended at 9.30am on the same day. As such, it would be unknown what transpired and how the fate of the eight public servants was deliberated upon and decided.

[28] PW1's counsel contended that the entire crux of this case can be determined by perusing the minutes of the board meeting held on 29 July 2013 at 9.30am. It would be useful at this point to look at the composition of the board and how the meeting purportedly proceeded and ended.

[29] Bundle C in which the minutes were enclosed were agreed and undisputed. Hence, the contents, which are indisputable, are part of the defence evidence as it is a defendants' bundle. The board comprised one Dato' Ir Abdullah bin Abd Rahman, the Director of JKR Selangor as the Chairman; a secretary, an assistance administrative officer from JKR Selangor; and the Deputy Director of JKR Selangor. According to what is expressly stated in the opening page, the meeting commenced at exactly 9.30am and ended on this note:

> 3.1 Mesyuarat Lembaga Tatatertib ditangguhkan pada jam 9.30 pagi dengan ucapan terima kasih daripada Dato' Pengerusi"

[30] Preparation of the minutes was by the secretary who signed and dated it on 10 August 2013 while the checking was done by the Deputy Director who signed it on 14 August 2013 before the Chairman approved and endorsed it on 14 August 2013. Hence, there can be no doubt that the minutes must have been correctly recorded with little room for error which, however, was not ever suggested.

[31] What was discussed and deliberated on the charges against the eight persons named, including PW1, and their representation is not recorded and is unknown. The inescapable conclusion is that nothing was discussed or considered by the board considering that the important meeting commenced at 9.30am and ended on the same minute according to the defendants' own documentary evidence. In all probability, no discussion took place nor any consideration given to the reports and representations in respect of all the eight public servants involved. No independent evidence was led by the defence to counter what the minutes reflected as to the proceedings of the board. It was on this ground that it was contended on behalf of PW1 that the minutes were in all probability a mere fact and no meeting actually took place as stated.

[32] None of the two defence witnesses was present at the meeting to give direct evidence and confirm what transpired at the meeting was as recorded in the minutes to offer a reasonable explanation as to time stated for the commencement and adjournment of the meeting. DW2, the key witness for the defendants was in no position. When questioned, on the aforesaid issue of time recorded in the minutes and whether he disputed it he merely answered that at that point in time he had not began his service with the service commission ('D2').

[33] Article 13 of the Federal Constitution states that:

> No person shall be deprived on property save in accordance with law.

[34] Lastly, in view of the undisputed facts and documents, PW1's counsel contended that the dismissal of PW1 and the cancellation of his emolument were done in a cavalier manner that was prejudicial to him and not in accordance with the law and due process.

[35] As for the case of the defendants, the learned Federal Counsel ('FC') representing them submitted, *inter alia*, that in law the burden of proof in a civil claim rested on the plaintiff in the first place and no onus shifts to the defendant until and unless the burden is discharged. She cited in support the Court of Appeal case of *Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd* [2014] 4 CLJ 323 where it was held:

> It is trite law that in a civil claim the legal burden rests throughout with the plaintiff to prove its claim. Until and unless the plaintiff discharges its legal and evidentiary burden of proving its claim, the burden does not shift to the defendant to prove its defence, no matter how weak the defence might be (see: *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] MLJ 253 CA, *UN Pandey v. Hotel Marco Polo Pte Ltd* [1978] 1 LNS 223; [1980] 1 MLJ 4, *Sundram Ramasamy v. Arujunan Arumugam & Ano*r [1994] 4 CLJ 300 and *Syed Mohamed Syed Alwi & Ors v. Shariffah Badariah Alwi Al-Attas & Ors & Other Cases* [2009] 1 LNS 1234).

[36] It was further contended that the allegation of PW1 on the core issue raised by his counsel was untenable as the plaintiff in his SOC had only pleaded the action of the defendants was unreasonable, unfair and flouted law and procedure. Nowhere was it pleaded what law was breached or what procedure was not complied with before the decision by the defendants and the penalty imposed on PW1.

[37] To my mind, the defendants' contention had no merits as the issue pleaded referred to above is clearly wide enough to encompass the fundamental procedural defect alleged against the defendants which renders the whole action taken against PW1 an illegality and a nullity for not being in accordance with procedural law.

[38] In advancing her contention as above, the learned FC also sought to rely on the established principle pertaining to an unpleaded cause of action that the court should not consider and referred to the Court of Appeal judgment of *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773 where it was held:

> Causes Of Action Not Pleaded
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> [80] Confronted with the reality of the matter, the respondents abandoned all arguments pertaining to a cause of action based on good faith. However, the respondents changed their course and relied heavily on "breach of legitimate contractual expectations". But, unfortunately, this was not pleaded and there is no such cause of action of this nature.
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> [81] In an otherwise well written judgment, the High Court Judge held that the first appellant was liable for "breach of duty of good faith" and for "breach of fiduciary duties". With due respect, the findings of the High Court Judge were all based on causes of action that were not pleaded. On this ground alone, the appeal should be allowed. Sharma J in *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196, religiously spoke about pleadings in this way:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

[39] Based on this principle, it was submitted that the plaintiff was estopped from raising the issue of the invalidity of the Disciplinary Board meeting as elaborated as he did not dispute that the meeting took place. With respect, I did not find any substance in this submission as the plaintiff had expressly pleaded broadly that the action taken against him and penalty imposed had infringed law and procedure, including sales of nature. Hence, the sole ground raised by him through counsel cannot be considered as abandoning his pleaded cause of action and totally charging his course. It was, thus, not a ground premised on an unpleaded cause of action that could be rejected *in limine*.

Conclusion

[40] To sum up, I would conclude on the threshold issue raised by the plaintiff as below.

[41] I have considered the evidence adduced by the plaintiff and the defendants, the contentions of the parties and the main issues arising for determination based on the pleadings.

[42] The central issue is whether the decision of the third defendant to dismiss the plaintiff from public service and to cancel his emoluments was in accordance with procedural law and the rules of natural justice. In this regard, the most important fact that is beyond dispute is that the third defendant, based on the minutes of its meeting to consider the recommendation to dismiss the plaintiff and several other public servants took less than a minute to make its decision.

[43] Hence, it is manifestly clear that the third defendant, as contended by the plaintiff, did not give any consideration to or deliberate upon the reports and evidence against the plaintiff before making its decision.

[44] Under the Disciplinary Regulations or Peraturan Pegawai Awam Negeri Selangor ('the Regulations') governing disciplinary action and procedure against public servants in Selangor, it is mandatory and crucial for

A the Disciplinary Board or Lembaga Tatatertib (third defendant) to duly consider and deliberate upon all the relevant facts and evidence on record against public servant relating to the alleged misconduct by him before making its decision and imposing the appropriate penalty.

B **[45]** It is abundantly clear from regs. 37 and 37D of the Regulations that the disciplinary authority plays the most vital role in the disciplinary proceedings leading eventually to its decision. Based on the provisions therein it is encumbered for the DA to exercise its mind and consider all the information and reports as well as representation placed before it before making its findings at the various stages and its final decision. I need only C refer to reg. 37 which clearly expresses the powers and function of the DA at the conclusion of the proceeding in these terms:

> Jika, setelah menimbangkan representasi pegawai dan laporan Jawatankuasa Penyiasatan, jika ada, Pihak berkuasa Tatatertib yang berkenaan:
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> D
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> (a) mendapati pegawai itu bersalah atas kesalahan tatatertib yang dikatakan telah dilakukan olehnya dan pegawai itu patut dibuang kerja atau diturunkan pangkat, Pihak Berkuasa Tatatertib itu hendaklah mengenakan hukuman buang kerja atau turun pangkat, sebagaimana yang difikirkan sesuai oleh Pihak Berkuasa Tatatertib E itu:
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> (b) mendapati pegawai itu bersalah atas kesalahan tatatertib yang dikatakan telah dilakukan olehnya tetapi, setelah mengambil kira dalam pertimbangan hal keadaan dalam mana kesalahan tatatertib itu telah dilakukan dan faktor peringanan yang lain, kesalahan itu tidak mewajarkan hukuman buang kerja atau turun pangkat tetapi F mewajarkan pengenaan suatu hukuman yang lebih ringan, Pihak Berkuasa Tatatertib itu hendaklah mengenakan ke atas Pegawai itu mana-mana satu atau lebih hukuman selain buang kerja atau turun pangkat sebagaimana yang dinyatakan dalam peraturan 38 sebagaimana yang difikirkan sesuai oleh Pihak Berkuasa Tatatertib itu; atau G
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> (c) mendapati pegawai itu tidak bersalah, Pihak Berkuasa Tatatertib itu hendaklah membebaskannya.

[46] Therefore, the third defendant's action in issuing letter dated 10 August 2014 to the plaintiff informing him that his right to emoluments H had been forfeited and that he was dismissed from public service was not in accordance with law for infringing the relevant provisions of the Peraturan Pegawai Awam Negeri Selangor and established rules of natural justice. Hence, the impugned decision of the third defendant that is challenged in this action is therefore invalid in law and void and a nullity.

I **[47]** I, accordingly, entered judgment for the plaintiff against the defendants as per prayers (a), (b), (c), (d) and (f) with the usual interest on the judgment sum.

Damages

[48] On the facts and evidence as to the conduct of the plaintiff on being absent from work without leave and without valid grounds which he himself did not dispute, I hold that he is not entitled to exemplary damages which is without any basis as prayed for in the prayer (a). I wholly agree with the learned Federal Counsel for the defendants that under the facts and circumstances of this case, the claim for aggravated damages need not be considered as the plaintiff has not satisfied any of the criteria for this type of damages to be awarded, *inter alia*, he had failed to set out in his SOC the essential particulars or the factual matrix or special facts that would justify this claim being awarded. Reference can be made to *Shen & Sons Sdn Bhd v. Jutawarna Development Sdn Bhd & Ors* [2015] 8 CLJ 125 where the High Court correctly held:

> (e) The failure to specifically claim aggravated and/or exemplary damages as a relief is not necessarily fatal. It is however desirable that it be claimed as a specific relief in the statement of claim.
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> (f) It is however, mandatory for a party claiming aggravated and/or exemplary damages to set out the requisite particulars or the factual matrix or the special facts in the statement of claim to support a claim for aggravated and/or exemplary damages. This would include but is not limited to the mental distress or hurt feelings suffered by the plaintiff's directors, shareholders or staff. The failure to provide the necessary particulars or the factual matrix or special facts for aggravated and/or exemplary damages is fatal. The failure to set out the impugned conduct of the defendants' representatives in the statement of claim for purposes of exemplary damages was fatal to the claim for exemplary damages.

[49] This claim for exemplary damages is, therefore, dismissed with costs.